Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

JEROME MARTIN,
Petitioner,

v.

KENTUCKY STATE POLICE; ET AL.,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court
Commonwealth of Kentucky

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

This case involves important issues regarding the interpretation and application of the Constitution of the United States and specifically issues related to substantive and procedural due process as guaranteed by Amendment 14 of the Federal Constitution, but applied to state action. The specifics of this case involve the employment termination and the process of termination from employment with the Kentucky State police of a black trooper who was accused of engaging in an act of oral sex while on duty and then further accused of lying about the act. During the termination process (as well as before and after), Trooper Martin's constitutionally guaranteed rights of due process were at risk and the questions, herein, revolve around the termination process. The questions specifically formulated are:

1. Did the Kentucky State Police Trial Board Deny Trooper Martin constitutionally guaranteed due process when it acted beyond its authority and jurisdiction.

2. Did the Kentucky State Police Trial Board act beyond its authority and jurisdiction when its decision was not supported by substantial evidence.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

The Movant herein is Trooper Jerome Martin who was terminated from employment with the Kentucky State Police.

The Non-Movants are the Agency (the Kentucky State Police); the Chief Executive Officer of the Agency (the Kentucky State Police Commissioner); and the members of the Trial Board who heard the evidence for and against Trooper Jerome Martin and made a determination that Trooper Martin should be dismissed from the force. The Trial Board members are Cpt. John Witt, Cpt. Lonnie Moert, Lt. Jerry Helm, Trooper Stanley Jones, Trooper Joe Allen, and Trooper Mark Cool.

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT FROM A DECISION OF THE SUPREME COURT OF KENTUCKY

The Petitioner, Jerome Martin, respectfully prays that a Writ of Certiorari issue from this honorable Court to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered on June 18, 1998 that denied the Petitioner's prayer for rehearing after said Supreme Court reversed the well reasoned decision of the Court of Appeals of Kentucky which had held that the constitutionally protected due process rights of the Petitioner had been violated.

OPINIONS BELOW

The Supreme Court of Kentucky reversed the well reasoned decision of the Kentucky Court of Appeals wherein the appellate court determined that Trooper Jerome Martin [who was the lone black trooper at the eastern Kentucky State Police (hereinafter "KSP") Post No. 9 which is responsible for several eastern Kentucky counties] had not receive constitutionally guaranteed fundamental due process from his employer, the KSP, in it's administrative action terminating him as a police officer.

On December 18, 1990, an administrative employment hearing (called a Trial Board) was convened by the KSP to conduct an evidentiary hearing on charges that a white male identified as Tim Branham (who had been victimized by a theft earlier in the day) allegedly engaged in oral sex with Trooper Jerome Martin (who had been assigned to investigate the theft at Branham's home) in Trooper Martin's police cruiser during the first hours of an investigation. Formal charges were brought against Martin for (1) Non-conformance to the law (specifically committing sodomy in the fourth degree in violation of KRS 510.100); and (2) Dishonesty (for lying about the commission of the underlying conduct).

On January 11, 1991, the Trial Board hearing was concluded and the Trial Board found Martin guilty of both charges. Pursuant to applicable law, Martin properly appealed this decision to the Franklin Circuit Court in Frankfort, Kentucky. On February 25, 1994, the Franklin Circuit Court affirmed the Trial Board's decision. (See Appendix Exhibit No. 1). Martin then appealed the Franklin Circuit Court's decision to the Kentucky Court of Appeals. The Kentucky Court of Appeals vacated the Franklin Circuit Court decision and remanded the matter to the Franklin Circuit Court citing the case of the

Commonwealth of Kentucky vs. Wasson, Ky, 842 S.W.2d 487 (1992). (See Appendix Exhibit No. 2). The Wasson decision struck down as unconstitutional the sodomy statute under which Trooper Martin had been charged.

On June 15, 1995, the Franklin Circuit Court entered an amended order vacating the Trial Board's decision as to the charge of non-conformance to the law. (See Appendix Exhibit No. 3). However, the Franklin Circuit Court found that there was substantial evidence to support the Trial Board's decision to dismiss Trooper Martin on the charge of dishonesty. In essence, the Franklin Circuit Court determined that Trooper Jerome Martin had lied (while maintaining his innocence) about the underlying conduct regardless of its now decriminalized status.

Jerome Martin appealed a second time to the Kentucky Court of Appeals. On December 13, 1996, the Court of Appeals determined that the Kentucky State Police administrative Trial Board had an obligation to adhere to fundamental due process and had not. (See Appendix Exhibit No. 4).

On February 13, 1997, the Kentucky State Police moved for discretionary review of the December 13,1996 Court of Appeals decision by the Supreme Court of Kentucky. On March 19, 1998, the Supreme Court of Kentucky reversed the Kentucky Court of Appeals decision and reinstated the decision of the Franklin Circuit Court confirming the dismissal by the Kentucky State Police of Trooper Jerome Martin. (See Appendix Exhibit No. 5).

On June 18, 1998, the Supreme Court of Kentucky entered an Order Denying Petition for Rehearing which had been timely filed by Trooper Jerome Martin. (See Appendix Exhibit No. 6).

JURISDICTION

The judgment of the Supreme Court of Kentucky reversing the Kentucky Court of Appeals was entered on March 19, 1998. Subsequently, the appellant timely petitioned for rehearing before the Supreme Court of Kentucky which was denied on June 18, 1998. This petition for a Writ of Certiorari is being filed less than 90 days after the date the aforesaid petition for rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED AND THE TIMING OF PRESENTATION TO THE COURTS BELOW

From the very beginning of the appellate process (i.e. the first appeal to the Commonwealth of Kentucky Court of Appeals as noted in the appellant's brief of June 15, 1994), Trooper Martin has raised the issue of the failure of the KSP to afford the appellant/movant the due process guaranteed by the 14th Amendment of the United States Constitution. In fact, the Commonwealth of Kentucky Court of Appeals rendered its decision in favor of Trooper Martin based upon the failure of the KSP to adhere to fundamental due processes guaranteed by the Constitution of the United States. The first mention of these guarantees along with the appropriate citation (i.e. Amendment 14 of the United States Constitution) is in the very first appeal filed with the Commonweaith of Kentucky Court of Appeals, being the brief of the appellant filed on June 15, 1994. The argument about due process raised in the first appeal continued throughout Trooper Martin's many following appeals.

STATEMENT OF THE CASE

In the middle of the day of May 27, 1992, Trooper Jerome Martin ("Martin"), while working his assignment for the day, (i.e. traffic patrol), was reassigned by his supervisors at Kentucky State Police Post No. 9 to go several miles to a different part of rural Pike County, Kentucky to investigate a theft at the home of Tim Branham which had been reported earlier that morning. (TBT Vol. I, Pg. 46). On May 29, 1992, KSP Post No. 9 received a report through one of its' officers that the officer's mother, Mrs. Doris Ray, had seen "the black trooper" and a white male in Martin's police vehicle on May 27, 1992 on a cemetery road across from Branham's house. Not knowing that Martin had minutes before the sighting been assigned to investigate the theft at Branham's home, she assumed the two must have been engaging in oral sex because the white male was leaning over from the passenger side of the car towards the driver's side of the car. (TBT Vol. VI, Pg. 5; Vol. II, Pg. 63). (Branham had months previously been accused of sexually molesting a teenage boy who was related to Doris Ray).

The KSP at Post No. 9 immediately prepared a complaint against Martin which was never signed by the

alleged sole eye witness. Mrs. Ray, shortly thereafter (i.e., within a few days of May 27, 1992), underwent a polygraph examination to determine the veracity of her statements. The polygraph examination was conducted by the KSP and was videotaped. During the video taped polygraph interview (which she failed miserably), she clearly indicated she had not seen anything. The KSP polygraph examiner, Lt. Woods, repeatedly asked her to help the KSP prove what they already knew to be true. (The appellate courts need look only to the video taped polygraph examinations of Doris Ray and Trooper Martin conducted by the KSP within days of the alleged incident to see in detail the true posture of the KSP, the lack of due process from the beginning and the utter lack of evidence to support their administrative conduct.)

Later the same day of Mrs. Ray's polygraph examination, Trooper Martin underwent a polygraph examination. Lt. Woods writes a report which concludes that Martin was lying. (Lt. Phil Woods, the polygraph examiner for the KSP, concludes that Martin was lying, even though just minutes before he tells the sole alleged eyewitness, Doris Ray, that the KSP already knew the truth and the sole eyewitness is helping the KSP confirm what they already know to be true. There was no other evidence

which existed except Mrs. Ray's testimony and her testimony was that nothing happened. Moreover, Lt. Phil Woods repeatedly badgers Martin to confess to what the KSP already knows to be true; i.e. Martin had committed an act of sodomy with the victim of a theft within minutes of being assigned to investigate the crime.) This polygraph examination is likewise preserved on video tape.

In both videos, the initial and constant bias of the KSP against the sole black trooper at Post No. 9 is clearly seen. Though Mrs. Ray fails the examination miserably, her story that Martin and Branham are in a State Police cruiser together is assumed by the KSP to be evidence they committed sodomy (he is black and evidently it must be assumed that all black males would engage in this conduct) and though Mrs. Ray clearly admits (on video tape for all commanding officers of the KSP to see) that she cannot truthfully testify that any sexual conduct occurred, the KSP insist that she testify against Martin.

The KSP's polygraph charts and graphs were reviewed by an independent expert from the University of Kentucky who concluded that the KSP lied about the results of Martin's polygraph examination.

Initial overwhelming contradictions between the charge and the evidence should have signaled a conclusion to the tragic allegations against Martin, but none the less the KSP wanted to proceed to a Trial Board. Nearly six months after the allegation first arose, a Trial Board was convened.

The Trial Board was presented with overwhelming evidence that the allegation was spurious and, at the same time, had presented to it to no substantial evidence to support the allegation. For example, Mrs. Ray, the sole alleged eyewitness (who had admitted on video tape record six months before the trial and again at trial not seeing anything sexual in nature in the conduct of trooper Martin and/or Mr. Branham), when directed to select from a series of photographs, a picture of the place where the alleged incident occurred, selected a photograph of the distant and opposite end of the road. (TBT Vol. II, Pg. 19, 27).

Other evidence that nothing sexual between Martin and Branham happened on that day was presented. Mrs. Ray's May 30, 1990 statement given near the time of the incident to the KSP indicates she remained in her car while her husband backed down the incline because the cruiser had the road blocked. Yet Mrs. Ray stated to the Trial

Board that she exited her car immediately behind the police cruiser and peered in to the cruiser while her husband backed down the incline. (TBT Vol. II, Pg. 5, 73). At the Trial Board Hearing, Mrs. Ray could not state whether she stood upright and looked into the cruiser or whether she leaned over to peer into the window. (TBT Vol. II, Pg. 39). Mrs. Ray, at one point, indicates she had difficulty walking around the cruiser because of the narrowness of the road, yet later testified that she passed around the cruiser with room to spare. (TBT Vol. II, Pg. 30). Mrs. Ray testified that following the alleged incident, she was very frightened and afraid she might be followed, yet after leaving the scene of the alleged incident, she quickly separated from her husband and went alone to a different nearby cemetery. (TBT Vol. II, Pg. 55-56, 101).

More important than the above is the clear bias that the KSP had in this matter. They acted as investigator, prosecutor, judge and jury in the Trial Board proceedings. The chief investigator, Lt. Ed Shemelya, who was from Post No. 9, clearly indicated that he did not care whether Martin passed a polygraph examination or not, he would under no circumstances believe Trooper Martin was anything but a liar. Moreover, he acknowledged that he had turned his back on major unreconcilable discrepancies

in the story of the sole eye-witness, Mrs. Doris Ray. He knew that she had told the KSP she could not tell what, if anything, had happened.

This chief investigative officer further admitted that in his investigation of the charges against Martin, he was looking for certain generic non-relevant discrepancies in Martin's record. He knew that Martin and Branham did not know each other prior to Martin being assigned on the day of the alleged incident (just an hour or so before the alleged incident) to investigate the theft at Branham's house. He admitted that he only kept for the official file those facts which Shemelya thought would benefit KSP's case against Martin and ignored those which would clearly be exculpatory for Martin. (TBT Vol. IV. Pg. 16).

On the other hand, Lt. Shemelya recognized there were several major discrepancies in Doris Ray's story, but he thought they were not significant and they should be overlooked. (TBT Vol. V., Pg. 22). One of the significant discrepancies in Mrs. Ray's story that Shemelya thought should be discarded was that Mrs. Ray had taken and failed the polygraph examination within days of the alleged event and that she admitted that she did not really know what she had seen or if anything had occurred. In fact, Shemelya

thought it should be disregarded that Mrs. Ray had stated at one point on the record that she had not seen an act of oral sex and that all she had seen was a man leaning over in a state police cruiser. (TBT Vol. IV, Page 23).

Lt. Shemelya furthermore admitted that his investigation did not explore any racial animus on the part of the sole alleged eyewitness, even though Mrs. Ray had identified Martin as "the black trooper" rather than by name or other available description. (TBT Vol. V., Pg. 46). The investigation into Mrs. Ray's background as a part of the official file did not include the fact that her second husband was killed by a black man, who was committing a felony crime. This was true even though Shemelya and others in the investigative, prosecutorial chain were well aware of this racially involved, emotionally charged episode and its significance. (TBT Vol. V., Pg. 11). The decision not to put this evidence before the Trial Board and not to reveal it to Martin or Martin's counsel at the Trial Board or make further investigation, was a policy decision made by the KSP. (TBT Vol. V, Pg. 13).

Furthermore, Shemelya admitted that although he knew that Mrs. Ray doubted if she had seen anything and

that Mrs. Ray did not actually see any kind of sexual act, her doubt filled testimony that Martin and Branham were together and that one was leaning over the other was sufficient for him to believe that an act of sodomy had occurred. (TBT Vol. IV, Pg. 23). Shemelya indicated that even if he were told that Martin had passed a polygraph examination and that Mrs. Ray had failed a polygraph examination (as he knew the case was), it would not change his mind that the sole black trooper at the Post was a liar and had committed an act of sodomy. (TBT Vol. IV, Pg. 32).

Finally, Shemelya admitted that the KSP had not arrested Martin before the convening of the Trial Board and had not referred the matter for criminal prosecution, which would have been clearly in keeping with the KSP's mission to seek, deter, detect and/or arrest (not prosecute) criminal offenders before pursuing the matter administratively. The decision to get Martin administratively before referring for criminal prosecution was an internal policy decision. (TBT Vol. IV, Pg. 62).

The evidence presented at the Trial Board (including and beyond Mrs. Ray) was not only suspect and incoherent, but was a direct contradiction to the kind of

investigative police work which one would hope the State Police would use in its investigation of criminal activity. For instance, the KSP made much of the discovery of the presence of acid phosphatase, which was found on the front seat of the car Trooper Martin was driving on the date of the alleged incident. Acid Phosphatase is a constituent of semen, as well as many other things, such as vegetables. The KSP failed to identify that that same car had been used by other Troopers at Post No. 9 for a four to five month period of time between the time Martin was suspended and the date of the test. (Martin had no more access to the car after the allegations arose in May of 1992). No adequate chain of custody of the cruiser or the seat was ever established on the car for well over five months. The car, however, was not left unused, but rather several different officers used the car before the test. Moreover, the lab technician, who testified to the presence of acid phosphatase, could not say when the detected acid phosphatase was introduced into the car and that it could have been after May of 1992. Moreover, he could not opine whether the detected acid phosphatase had any connection with Martin or rather with any number of other troopers or others who had used or had access to the vehicle (much less the possibility of the chemical coming from vegetables which might have been on the seat.)

Finally, the alleged co-participant in the act of sodomy, Tim Branham, who had been accused of involvement in an unrelated homosexual act with an alleged victim who is related to Mrs. Doris Ray, began to have pressure put on him in this matter by the KSP. (TBT Vol. VI, Pg. 25-26). That alleged prior unrelated incident did not become a matter of urgent prosecution until the investigation and prosecution of this matter. (TBT Vol. III, Pg. 26-27). Mr. Branham was approached by Lt. Shemelya shortly after Martin was accused of committing an act of sodomy with him within minutes of meeting him for the first time and told that if he would assist the KSP in their action against Martin, the KSP would inform the Court in the unrelated matter of Mr. Branham's cooperation (TBT Vol. VII, Pg. 25). Mr. Branham indicated to the KSP he would simply tell the truth (which was not what the KSP wanted to hear) and Mr. Branham testified before the Trial Board that Mr. Martin conducted himself in a professional manner and vehemently denied that any sexual act occurred. (TBT Vol. VII, Pg. 26, 28).

REASONS FOR GRANTING THE WRIT

CONCISE STATEMENT OF PERTINENT LAW

"... due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, in the risk of an erroneous deprivation of such interest through the procedures used and a probable that you, if any, of additional ourselves to procedural safeguards; and finally, the governments interest, including the function involved and the fiscal and administrative burden that additional ourselves to procedural requirements would entail." Matthews v. Eldridge, 424 U.S. 319, 343; 96 S.Ct. 893,907; 47 L.Ed.2d 18 (1976); see also Goldberg v. Kelly, 397 U.S. 263, 266; 90 S. Ct. 1018, 1020.

"The due process clause not only requires that the government follow appropriate procedures when it seeks to deprive any person of life, liberty or property, it also prevents certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662,665; 85 L.Ed.2d 662 (1986).

" Thus, the due process clause has a substantive component which guarantees that all fundamental rights comprised within the term Liberty are protected by the federal Constitution from invasion by the states." Whitney v. California, 274 U.S. 357, 373; 47 S. Ct. 641, 647; 71 L. Ed. 1095 (1927).

1. Did the Kentucky State Police Trial Board Deny Trooper Martin constitutionally guaranteed due process when it acted beyond its authority and jurisdiction.

Trooper Jerome Martin had a substantial and protected interest in his job. He always wanted to be in law enforcement and that was taken away from him because he maintained his innocence. The Commonwealth of Kentucky Court of Appeals found that the Kentucky State Police Trial Board had acted beyond its authority and jurisdiction and as such, it was a violation of Trooper Martin's rights of due process. It does not matter that the Trial Board gave a hearing and that the hearing was procedurally conducted with a sense of procedural fairness. A hanging can be predetermined but preceded by a hearing when all the appropriate parties are present, represented and given an opportunity to present evidence.

It is necessary to note that the Supreme Court of Kentucky had declared the statute which made sodomy a crime, namely, sodomy in the fourth degree (KRS 510.010) unconstitutional. If it not been for the accusations based upon an unconstitutional statute, Martin would not have had to assert the defense of a denial of the alleged conduct. It is a denial of due process to punish Trooper Martin for asserting a defense to conduct which is no longer punishable in and of itself. The KSP through the Trial Board was attempting to accomplish indirectly that which it could not do directly.

Secondly, the Trial Board, in the case at bar, exceeded its authority and denied Trooper Martin due process when it attempted to become a criminal court. It could not try Jerome Martin on the charges of sodomy and therefore, it could not try Martin for maintaining his innocence. Martin's dismissal was based upon his alleged violation of the sodomy statute (KRS 510.100) and the following denial of this allegation when Martin maintained his innocence. The second charge for dishonesty is a coordinated charge arising directly from the assertion of a defense; i.e. that Trooper Martin did not engage in conduct constituting sodomy. The allegations of the underlying conduct and Martin's denial are irrevocably intertwined and

are not severable. They are one and the same. It cannot be maintained that the Trial Board was barred from trying Martin for the crime of sodomy which would include proving the essential fact that an act of sodomy had occurred, but yet still be able to try him for maintaining his innocence about an the same. Both propositions would include a determination of the same facts. The charge which alleges violation of KRS 510.100 and the charge which alleges dishonesty contending that one did not tell the truth about violating KRS 510.100 is a distinction without a difference. Both charges would require the Trial Board to determine that a crime occurred. The Trial Board is without authority to adjudicate whether a crime had occurred. The KSP suspended Martin for six months and then tried him administratively. There was no reason why they could not have immediately referred this for prosecution through proper channels.

It is not enough to say that Martin might have been more appropriately charged with inefficiency and dishonesty. The fact remains, as cited by the Kentucky Court of Appeals below in its December 1996 decision, that he was accused of sodomy and that the KSP elected to proceed with an administrative inquiry prior to the trial of the criminal case. The KSP cannot now argue that a

different charge may have been more appropriate. The KSP, as well as any other administrative tribunal, has an obligation to adhere to fundamental substantive and procedural due process.

2. **Did the Kentucky State Police Trial Board act beyond its authority and jurisdiction when its decision was not supported by substantial evidence.**

It is of little wonder that the KSP has consistently argued that Appellate Courts should not review the record to determine whether or not substantial evidence supports the findings of the Trial Board. The subject administrative hearing, where the Agency is the investigator, the prosecutor, the jury and the judge of criminal conduct is that which is the most suspect in regards to the fundamental fairness which must be afforded to all citizens or employees in a state administered administrative hearing. Moreover, the suspect nature of this type of proceeding is only heightened when it is admitted by the investigative officers (notably Lts. Woods and Shemelya) that they are seeking witnesses to prove what they already know to be true. The fact that Woods is telling the chief witness, Doris Ray, that she is helping the KSP to prove what they already know to be true, makes these proceedings

exponentially suspect. The fact that Shemelya indicated that he did not care whether it was proved that Jerome Martin passed a polygraph examination and the chief eye witness for the KSP, Doris Ray, failed the polygraph examination, he would nonetheless never believe Jerome Martin, makes the conduct of the KSP infinitely more suspect.

The United States Supreme Court case of Goldberg v. Kelly, 397 U.S. 254 (1970) delineated the basic elements of constitutionally mandated due process in the context of administrative hearing, including but not limited to, the right to a fair hearing where predetermined prejudices rule the day while compotent, overwhelminng exculpatory evidence is ignored. The Kentucky Courts in the case of American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964) clearly indicated that an administrative hearing may not make determinations which are arbitrary and capricious. Such hearings must be fair. One element of an arbitrary and capricious determination is that which is not supported by substantial evidence. The reviewing Appellate Courts have the right to look at the evidence which was presented below for a determination of whether substantive supporting evidence existed. KRS

16.150(4). In Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972), the Court ruled that an administrative decision must be supported by substantial evidence. (The fairness and necessity of supporting evidence which has long been required by case law has recently been codified in KRS 13B.050, et. seq. and such is required by the 14th Amendment of the U.S. Constitution.)

The KSP chooses to characterize the record which the appellate courts reviewed as being cold and sterile. It fails to remember that the KSP chose to video tape some of its most egregious conduct in its prosecutorial campaign against Trooper Jerome Martin. The reviewing Courts have had the opportunity to review two video taped polygraph examinations which, in and of themselves, clearly demonstrate the bias of the KSP and the lack of evidence which permeated the entire process.

The KSP must maintain that a review for substantial evidence is inappropriate because once reviewed, the record reveals the void of due process and of substantial supporting evidence. Moreover, a review of the record reveals the reprehensible conduct of the KSP in the prosecution of this matter.

The Kentucky Court of Appeals of Kentucky below correctly reviewed the record and correctly saw the fatal and overwhelming lack of supporting substantial evidence and noted the same in its December 13, 1996 decision. As stated by that Court below, the Trial Board had an obligation to adhere to fundamental due processes which are constitutionally required. Fundamental due process, including but not limited to, the right to a fair hearing is something which should be enjoyed by all citizens, including but not limited to, the sole black trooper at Kentucky State Police Post No. 9 in Pike County, Kentucky.

CONCLUSION

For all the reasons stated above, Trooper Jerome Martin respectfully prays a Writ of Certiorari issue from this honorable Court to review the judgment of the Supreme Court of Kentucky and thereafter, upon hearing, that this Court reverse the decision of the Supreme Court of Kentucky.

Respectfully submitted,

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FRANKLIN CIRCUIT COURT:

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COMMONEALTH OF KENTUCKY COURT OF APPEALS:

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 91-CI-00091

JEROME MARTIN APPELLANT

v. ORDER

KENTUCKY STATE POLICE,et al. APPELLEE

I. STATEMENT OF THE CASE

This action comes before the Court on Appellant, Jerome Martin's, Appeal of a verdict of the Appellee, the Kentucky State Police Trial Board ("the Board") finding the Appellant guilty of Violating the Law and of Dishonesty and setting his punishment as dismissal from the Kentucky State Police ("KSP").

Martin appeals the verdict on the grounds that the Board exceeded its authority and jurisdiction in this matter, the Board was improperly instructed as to the standard of proof required to return a verdict of guilty, and the verdict was not supported by substantial evidence. Martin requests that this Court dismiss the charges against him and order his immediate reinstatement to the KSP.

The Board maintains that it acted within its authority and jurisdiction, it applied the proper standard of proof, and its verdict was supported by substantial evidence. For these reasons, the Board requests that its verdict be sustained.

II. FINDINGS OF FACT

1.Jerome Martin began working for the KSP in September, 1988. Martin was assigned to the Pikeville Post after spending five months at the State Police Academy. Martin was the only black trooper serving at that Post at that time.

2.On May 29, 1990, Doris Ray informed her son, KSP Trooper Terry Thompson, that she had observed a black trooper and an individual named Tim Branham engaged in an act of oral sex in a KSP car at the Pinson Cemetery in Meta, Kentucky on May 27, 1990.

3.Trooper Thompson reported this information through the KSP chain of command and an investigation ensued. Martin was suspended with full pay and benefits while the investigation was underway.

4.On November 19, 1990, administrative charges of Violation of Law and Dishonesty were filed against Martin

and he was suspended from duty without pay.

5.On December 18, 1990, a KSP trial board proceeding was convened to hear the matter.

6.Jerome Martin testified as to the events in Meta on May 27. He claimed that he was responding to a burglary complaint in the area and encountered Tim Branham, the complainant, on the dirt road leading to the cemetery. According to Martin, the two men got into Martin's cruiser so Martin could fill out a case report. A small blue station wagon drove up behind them on the narrow road. Martin drove the cruiser to the end of the road to turn the car around. Both men then got out of the cruiser and looked through the brush for stolen items. After approximately ten minutes, the blue car had turned around and was departing the area. While Branham was still in his cruiser, Martin followed the car out of the area.

7.Doris Ray testified as to her version of the same incident. She stated that on May 27, 1990, she and her husband, John Ray, drove to the cemetery to leave flowers at a grave. They drove up behind a State Police car bearing the number 408 but did not see anyone inside it. Because of the narrowness of the road, Mr. Ray could not pass the car. He let his wife out of the car and backed down the road. Doris Ray peered into the cruiser. She

described what she saw as follows:

> So, I walked up on the passenger's side and looked in. Trooper Martin had his pants down. And the other guy in the car had his head over between his legs, face down.
>
> (Transcript, Vol. 11, pp. 5-6.)

Doris Ray said that after observing this, she walked to the back of the car and her husband walked toward her from his car. At that point, according to Mrs. Ray, "the heads popped up in the front seat and the car pulled out real fast and spinned." (Transcript, Vol. 11, page 6.) Mr. Ray drove on, past the cruiser, which was pulled off on a graded area. Doris Ray saw Mr. Branham standing by the cruiser but did not see Trooper Martin because she was "embarrassed and I was looking the other way." (Transcript, Vol. 11, page 6.)

8. John Ray, Doris Ray's Husband, testified about the May 27th incident. He stated that when he and his wife drove by the cruiser he observed Trooper Martin "fixing" his pants or belt. (Transcript, Vol. 11, p. 110.)

9. Edward Taylor, Jr., a forensic serologist with the

KSP, testified that he conducted a semen analysis on KSP cruiser number 408 on September 21 and 22, 1990. He said that he identified a stain on the front seat of the cruiser, just under the steering wheel, that consisted of acid phosphatase, a component of semen. On cross examination, Taylor said it was not possible to determine whether the stain in the car related to the events of May 27, 1990, and, given the small size of the sample, it was impossible to determine the blood type.

10. Troopers Gary Martin and Jerome Root both testified that cruiser number 408 had been assigned to them before it was assigned to Jerome Martin. In Gary Martin's case, the car had been assigned to him for almost three years. Both men denied conducting sexual activity in the car or knowing of such activity being conducted in the car while it was assigned to them. Both men admitted that the car had been taken for servicing numerous times while the car was assigned to them. Gary Martin also testified that cruisers were taken to private garages for servicing and normally were left with the garage for several hours or overnight for that purpose. Gary Martin stated that other troopers may have used the car while it was assigned to him although he could not remember any instances of this.

9. Lieutenant Ed Shemelya testified about his investigation into the events of May 27. He testified that

on May 30, he interviewed Doris Ray, viewed the scene, and photographed it. He also interviewed Tim Branham.

10.Shemelya testified that Trooper Martin was brought to the Post on May 30 and told of the allegation against him. Shemelya said that Martin denied the incident but indicated that Martin's response was unusual under the circumstances. "I was expecting that he would vehemently deny the allegation and he didn't do that. It was almost off the cuff....." (Transcript, Vol. 111, p. 55.)

11. Shemelya testified that on May 31, he interviewed Tim Branham's wife. Shemelya described inconsistencies between Mrs. Branham's statement and that of her husband. Shemelya also recontacted Doris Ray who denied harboring any sentiments against Tim Branham and denied knowing Jerome Martin.

12.Shemelya testified that a polygraph examination was administered to Doris Ray on June 7, 1990, and that the examiner informed Shemelya that the results of this test would be inconclusive because Mrs. Ray was nervous and hostile. (Transcript, Vol. 111, p. 63.)

13.Lieutenant Shemelya pointed out several instances where the statement Jerome Martin gave in response to the accusations against him conflicted with time

records routinely kept by the KSP. According to Shemelya, the KSP 209 constitutes a record of a trooper's activities for a given day, including the time the trooper receives, arrives at, and leaves a call. Shemelya testified that there were multiple inconsistencies between Jerome Martin's KSP 209 for May 27, 1990, and the statement he gave the KSP in response to the charges against him. These inconsistencies include Martin's location when he received the burglary call to Tim Branham's and whether Martin was conducting a road check when he received the call.. (Transcript, Vol. III, pp. 63-74.)

On cross examination, Shemelya admitted that it was the dispatcher's responsibility, not the trooper's, to log in times and locations on the KSP 209 after the trooper called in to report his location. (Transcript, Vol. IV, p. 19.).

14. Tim Branham testified about the events of May 27th. His depiction of the incident was similar to that of Jerome Martin. Branham denied that any sexual activity took place between he and Martin.

15. After the evidence was taken, the Board was given the following instructions:

Instruction No. 1, Section AME-1 of the Kentucky

State Police Manual, provides in relevant part that all officers, whether on or off duty, shall obey all laws of the United States and of any state or local jurisdiction in which the officers are present. ... [T]he fact that no ... [criminal] prosecution is initiated shall not preclude the Department from taking disciplinary action for a violation of this standard. ...

Trooper Martin is charged with having committed the offense of Sodomy in the Fourth Degree ....

Instruction No. 2, Section AME-1 of the Kentucky State Police Manual provides in relevant part that officers shall at all times be honest and truthful in dealing with fellow officers or members of the public in any written or oral communication. Upon order of the Commissioner, the Commissioner's designee or their Commanding Officer, officers must answer and answer truthfully all questions specifically directed and narrowly related to the scope of employment and operations of the Kentucky State Police, which may be asked of them.

Dishonesty is a class A violation .... Trooper Martin is charged with Dishonesty as the result of

his failure to respond truthfully to questions from his commanding officers and from fellow officers in both written and oral communication, concerning the charges as set forth in Instruction No. 1 above.

...

Instruction No. 3, the Kentucky State Police bear the proof of burden [sic] on both charges brought against Trooper Jerome Martin. This burden of proof requires that the Department prove each charge by a preponderance of the evidence, which could mean that the evidence is sufficient on its face to mean what it says, which means that the evidence presented by the Department must outweigh the evidence presented by the Defendant. Only evidence presented at this hearing can be used to satisfy this burden. (Transcript, Vol. VII, pp. 81-83.)

16. In his closing argument, Martin's counsel maintained that the case against Martin was a swearing contest hinging upon whether the Board believed Jerome Martin and Tim Branham or Doris and John Ray. He also suggested that racial prejudice was an issue in the case. As he put it, the Board "must choose between the White, grandmotherly Doris Ray or the testimony of the reputed homosexual and the Black trooper." (Transcript, Vol. VII,

p. 92.) Martin's counsel characterized the charges against Martin as follows: "It's a story that very simply got out of hand when a Black, efficient State Police Officer was sitting in a car with a man, who evidently in this community has a reputation for being a homosexual." (Transcript, Vol. VII, p. 106.)

17. In his closing argument, the counsel for the KSP pointed out discrepancies in Trooper Martin's testimony and stated that Martin's it conspiracy theory" was "absolutely, positively unbelievable." (Transcript, Vol. VII, p. 126.) He denied that racial prejudice was an issue in the case.

18. On January 11, 1991, the Board issued two unanimous verdicts finding Jerome Martin guilty of violating the law and of dishonesty and fixed his punishment at dismissal from the Kentucky State Police.

19. On January 22, 1991, Martin filed this Appeal.

III. CONCLUSIONS OF LAW

A. THE KENTUCKY STATE POLICE TRIAL BOARD DID NOT EXCEED ITS AUTHORITY AND JURISDICTION IN THIS MATTER.

Martin claims that the Board tried him for committing the crime of sodomy and that a criminal trial is not within the Board's jurisdiction. Contrary to Martin's claim, the preceding in question was not a criminal trial but an administrative hearing. Martin was charged with two violations of the Kentucky State Police Standards of Conduct, Section AME-1. These charges were administrative, not criminal.

KRS 16.140(8) establishes a trial board for the Kentucky State Police"[f]or the purpose of hearing charges against any officer..... This statute "endowed the trial board of the ... State Police with the exclusive jurisdiction of discipline and removal of officers ... subject only to strict review on appeal by KRS 16.150(4)." Hughes v. Welch, Ky.App., 664 S.W.2d 205, 208 (1984). KRS 16.140(8) clearly gives the Board jurisdiction over the KSP's case against Jerome Martin.

B. THE TRIAL BOARD WAS PROPERLY INSTRUCTED AS TO THE CORRECT STANDARD OF PROOF TO APPLY IN THIS MATTER.

Instruction No. 3 required the board to apply a preponderance of the evidence standard to the Martin case. The Appellant claims that this instruction violated his

constitutional rights because, to be convicted of a crime, the case against the defendant must be proven beyond a reasonable doubt.

Martin is correct in asserting that a criminal conviction requires that a defendant's guilt be proven beyond a reasonable doubt but that principle is not relevant in this action. The preceding before the Board was an administrative, not criminal, preceding. An administrative determination of whether an individual has violated the law does not require proof beyond a reasonable doubt. Louisville Civil Service Bd. v. Blair., Ky., 711 S.W.2d 181, 183 (1986).

C. THE TRIAL BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

KRS 16.150(4) establishes the standard of review this Court must apply in reviewing decisions of the Board. The statute provides that:

> (4) .... [The Court's] review shall be limited to determining ...
>
> (c) If questions of fact are in issue, whether or not any substantial evidence supports the order appealed from.

This strict standard of review is upheld in Hughes v. Welch., Ky.App., 664 S.W.2d 205 (1981). If there is substantial evidence in the record to support the agency's decision, this Court must uphold it "even though there may be conflicting evidence in the record." Kentucky Com'n on Human Rights v. Fraser., Ky., 625 S.W.2d 852, 856 (1981). "The test of substantiality of evidence is whether ... it has sufficient probative value to induce conviction in the minds of reasonable men." Kentucky State Racing Commission v. Fuller, Ky., 484 S.W.2d 298, 308 (1972). The tder of fact in an administrative preceding has considerable latitude to evaluate evidence and assess the credibility of witnesses and may "choose the evidence that ... [it] believes." Com. Transp. Cabinet v. Cornell., Ky.App., 796 S.W.2d 591, 594 (1990).

Jerome Martin had the opportunity to present evidence regarding inconsistencies in the testimony of witnesses against him and their alleged biases. The Board heard Martin's evidence and found him guilty on both counts. It is true that conflicting evidence was presented at the hearing but the presence of conflicting evidence does not provide this Court with a basis for overturning the Board's verdict, as long as there is substantial evidence to support that verdict.

The testimony of the Rays provides substantial

evidence to support the Board's decision that Martin was guilty of committing sodomy. Doris Ray gave eyewitness testimony of a purported criminal act taking place in a State Police cruiser. John Ray's testimony supported her version of events.

Martin suggests racial prejudice and personal animosity as motivations for Doris Ray's testimony. These are important considerations but the law does not permit this Court to determine whether they are valid in this case. The law requires the trier of fact to assess the evidence and the credibility of witnesses. The Board heard the testimony and had the opportunity to observe the witnesses' demeanor. Consequently, the Board was in a far better position than this Court to determine whose testimony was more credible and to assess the potential biases of witnesses.

Martin, in his Memorandum, points out dozens of "discrepancies, inconsistencies and absurdities [which] utterly destroy any notion that substantial evidence was presented." (Appellant's Memorandum at 12.) For example, in regard to Doris Ray's testimony, he points out that Mrs. Ray "assumes that the position of the persons in the car (i.e. the passenger with his head between the shoulders and lap of the driver) were for the purpose of having oral sex (Transcript, Vol. 11, p. 70, question 315)."

(Memorandum, p. 15.) He also points out that she did not see Jerome Martin's genitals when she observed the incident. Martin writes in his Memorandum, "Doris Ray acknowledges that to be one hundred percent sure about an act of sodomy, she would have had to see where the genitals were..... (Memorandum, p. 16.)

Given the facts as Mrs. Ray relates them, her "assumption" that she observed an act of sodomy in the cruiser is reasonable. She admits that she could not be absolutely certain but maintains that she was "very confident that it was a sexual act." (Transcript, Vol. 11, p. 96.) Her reluctance to commit herself "one hundred percent" in this case does not necessarily cast doubt on her veracity. She describes what she claims she saw and the inference she drew from that. The Board was free to determine what weight to give this evidence and chose to believe Mrs. Ray.

Regarding Mrs. Ray's possible biases in this case, Martin points out that she is related to the alleged victim in an unrelated charge against Tim Branham. (Memorandum, p. 16.) Again, this information was given in evidence to the Board which was free to consider it in weighing the credibility of her testimony. Martin expresses reservations about the logistics of Mrs. Ray's actions on May 27, 1990. For example,

> Doris Ray claims that she and her husband waited five to ten ... minutes behind the trooper's car ... and then slammed the door as she exited the car .... Yet despite the noise and the Rays [sic] prolonged presence, she would have this Court believe she sees no one in the car until she walks beside the car.
>
> (Memorandum, p. 13.)

This testimony is not necessarily inconsistent with Mrs. Ray's story.

Martin points out inconsistencies between Doris Ray's testimony before the Board and the statement she gave on May 30, 1990, and her misidentification of a photograph of the scene. (Memorandum, pp. 13 and 15.) Martin's counsel had the opportunity to bring these issues to the attention of the Board and did so. It was up to the Board to consider the impact of these inconsistencies and the misidentification in the context of the total evidence before it.

Martin makes much of his claim that Doris Ray failed the first polygraph test administered to her. This claim is misleading. In fact, according to Lieutenant Shemelya's testimony, the examiner informed Shemelya

that the results would be "inconclusive" because of Doris Ray's emotional state. (Transcript, Vol. 111, p. 63.)

Martin maintains that the inconsistencies between Martin's statement and the entries on his KSP 209 for May 27th are "minor." These discrepancies relate to where Martin was and what he was doing when the Branham burglary call came in. Again it was up to the Board to give proper weight to these inconsitences.

Doris Ray's testimony, supported by the testimony of John Ray, constitutes substantial evidence that Jerome Martin is guilty of violating the law. Lieutenant Shemelya's testimony regarding the inconsistencies between Jerome Martin's statement to him and his KSP 209 for the day and his statements concerning the incident constitute substantial evidence of dishonesty.

THEREFORE, it is the ORDER of this Court that the verdicts of the Kentucky State Police Trial Board finding Jerome Martin guilty of Violating the Law and of Dishonesty are SUSTAINED and Jerome Martin's Appeal is DISMISSED.

So Ordered this 25th day of February, 1994.

There being no just reason for delay, this is a final and appealable ORDER.

ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT
COURT

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RENDERED MARCH 24, 1995: 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

JEROME MARTIN APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 91-CI-91

KENTUCKY STATE POLICE;
KENTUCKY STATE POLICE COMMISSIONER;
CAPTAIN JOHN WITT; CAPTAIN LONNIE MOERT;
LIEUTENANT JERRY HELM; TROOPER STANLEY
JONES; TROOPER JOE M. ALLEN; and TROOPER
MARK COOL APPELLEES

OPINION
VACATING AND REMANDING WITH DIRECTIONS

BEFORE: LESTER, CHIEF JUDGE; HOWERTON and MILLER, Judges.

MILLER, JUDGE: Jerome Martin brings this appeal from

a February 25, 1994, order of the Franklin Circuit Court. We vacate and remand with directions.

On January 11, 1991, the Kentucky State Police Trial Board (the Board) found appellant,
an office of the Kentucky State Police force, guilty of disobeying the law and of lying by denying same. Specifically, he was found guilty of engaging in the act of oral sex with another man on May 27, 1990, in violation of the criminal offense of fourth-degree sodomy (Ky. Rev. Stat. (KRS) 510.100), and was accordingly terminated from the force. He appealed to the Franklin Circuit Court. On February 25, 1994, the circuit court sustained the Board's order. This appeal follows.

In Commonwealth v. Wasson, Ky., 842 S.W.2d 487 (1993), the Supreme Court of Kentucky held KRS 510.100 unconstitutional in relation to criminalizing homosexual conduct. We believe it appropriate that the circuit court reconsider its order in light of Wasson.

For the foregoing reasons, the order of the circuit court is vacated, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

ATTORNEY FOR APPELLANT:
Earl C. Mullins, Jr.
Masters, Mullins & Arrington
Louisville, Kentucky

ATTORNEY FOR APPELLEES:
James A. Daley
Kathy Walton
KSP Legal Office
Frankfort, Kentucky

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT
COURT CIVIL ACTION NO. 91-CI-00091
DIVISION 1

JEROME MARTIN **PLAINTIFF**

vs. **AMENDED ORDER**

KENTUCKY STATE POLICE, et al. **DEFENDANT**

This matter is before this Court upon Remand from the Kentucky Court of Appeals (94-CA-0616-MR), directing this Court to reconsider this Court's decision of February 25, 1994, sustaining the Trial-Board's Order in light of the decision reached by the Kentucky Supreme Court in Commonwealth v. Wasson, Ky., 842 S.W.2d 487 (1993).

Pursuant to the directions of the Court both parties to this action have filed briefs on Remand and the Court is fully advised.

It is the Opinion of this Court that the Petitioner was charged with violating a Criminal Statute of the Commonwealth of Kentucky, not with nonconformance to duty, and since that statute has now been declared

unconstitutional in Commonwealth v. Wasson, the conviction by the trial board cannot be used as a basis for dismissal by the trial board.

It is also the Opinion of this Court that there was substantial evidence in the record to support the trial-board in its decision to dismiss the Petitioner for dishonesty. As there is substantial evidence in the record to support the trial board's actions concerning Count II of the charges, it is the **ORDER** of this Court that decision of the trial board as to Count II of the charge is **SUSTAINED.** The decision of the trial board as to Count I is Vacated.

There being no just cause for delay, this is a final and appealable order.

SO ORDERED this 15th day of June. 1995.

ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

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RENDERED DECEMBER 13, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 95-CA-1628-MR

JEROME MARTIN APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
V. HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 91-CI-0091

KENTUCKY STATE POLICE,
KENTUCKY STATE POLICE COMMISSIONER,
CAPTAIN JOHN WITT, CAPTAIN LONNIE MOERT,
LT. JERRY HELM, TROOPER STANLEY JONES,
TROOPER JOE M. ALLEN, and TROOPER MARK
COOL APPELLEES

OPINION REVERSING

BEFORE:COMBS, GARDNER, and MILLER, Judges.

COMBS, JUDGE. Jerome Martin (Martin) appeals the Franklin Circuit Court's amended order sustaining the Kentucky State Police Trial Board's (Trial Board) decision

to dismiss him for dishonesty. Martin argues on appeal that the Trial Board exceeded its authority and jurisdiction, that its findings were not supported by substantial evidence, and that its decision was arbitrary and capricious. We agree and reverse the circuit court's order.

Jerome Martin, a Kentucky State Trooper, was assigned to Kentucky State Police Post No. 9 in Pikeville, Kentucky. On May 27, 1990, Doris Ray was visiting the Pinson Cemetery, Pike County, where she said that she believed she observed Martin and a white male identified as Tim Branham allegedly engaging in oral sex in Martin's police cruiser. Mrs. Ray reported this incident to her son, Terry Thompson, also a Kentucky State Trooper. On May 29, 1990, Trooper Thompson reported his mother's allegations to his supervisors. An investigation was conducted, and Martin denied the allegation. Formal disciplinary charges were filed against Martin for: (1) nonconformance to the law (committing sodomy in the fourth degree in violation of KRS 510.100); and (2) dishonesty for lying about the commission of the underlying conduct.

On December 18, 1990, the Trial Board convened to conduct an evidentiary hearing on the matter. On January 11, 1991, the hearing was concluded, and the Trial Board found Martin guilty of both charges. He was

dismissed from the Kentucky State Police. Pursuant to 16.150, Martin appealed the Trial Board's decision to the Franklin Circuit Court. On February 25, 1994, that court affirmed the Trial Board's decision. Martin then appealed the circuit court's decision to this Court. Action No. 94-CA-000616. This Court vacated and remanded the circuit court's order, citing Commonwealth v. Wasson, Ky., 842 S.W.2d 487 (1992), in which the Kentucky Supreme Court struck down as unconstitutional KRS 510.100,-the sodomy statute under which Trooper Martin had been charged. This Court directed the circuit court to reconsider its order in light of the Supreme Court's decision. On June 15, 1995, the Franklin Circuit Court entered an amended order vacating the Trial Board's decision as to the charge of nonconformance with the law. However, the circuit court found that there was substantial evidence to support the Trial Board's decision to dismiss Martin on the charge of dishonesty; i.e., that he had lied about the underlying conduct regardless of its now decriminalized status. This second appeal followed.

Appellate review of a disciplinary action is essentially limited to the determination of whether: (1) the board acted without or in excess of its powers; (2) the order appealed from was procured by fraud; or (3) there was substantial evidence to support the order appealed from -- if questions of fact are in dispute. KRS 16.150(4).

Substantial evidence is defined as evidence which, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406 (1994). In the case sub judice, we find the Trial Board has exceeded its authority and-that its decision was not supported by substantial evidence.

Pursuant to KRS 16.140(l), an officer shall not be "removed, suspended, reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation of law or of any rule or regulation promulgated by the commissioner." Martin's dismissal was based upon his alleged violation of KRS 510.100 and his resulting denial of this allegation. The coordinating, secondary charge of dishonesty arose directly from his assertion of a defense: i.e., that he had not engaged in the conduct constituting sodomy. Under the unique factual scenario of this case, we find that the underlying conduct and Martin's denial are so intertwined as not to be severable for the purpose of providing alternate grounds for his dismissal.

As noted earlier, KRS 510.010 (sodomy in the fourth degree) was declared unconstitutional in Wasson, supra. But for the accusation based upon that unconstitutional statute, Martin would have had no occasion to assert the defense of a denial of the alleged conduct.

We hold that any prosecution, reprisal, or disciplinary action in pursuit of, resulting from, or flowing from the primary charge of sodomy is invalid as it arises directly from an act that has been specifically decriminalized by the Kentucky Supreme Court. Any Associated or tangential allegations of wrongdoing must fail accordingly. It amounts to a denial of due process to punish him for asserting a defense to conduct which is no longer punishable in and of itself. We agree with Martin's argument that the Board was attempting to accomplish circuitously that which it could not do directly. In so doing, it acted arbitrarily and beyond the scope of its legitimate jurisdiction.

We also find that a second ground exists as a basis for reversing the circuit court: the lack of substantial evidence to support the conclusions of the Trial Board. The record at the administrative level is replete with contradictions, inaccuracies, and inconsistencies with regard to the alleged incident. Mrs. Ray, Martin's sole accuser and eyewitness, could not testify clearly as to anything she supposedly witnessed. She "assumed" that Trooper Martin and Tim Branham were engaged in an act of sodomy even though she testified that she never really witnessed the conduct directly. Furthermore, she could not state with certainty whether she remained in her husband's car or whether she exited it to peer inside the police

cruiser. She was not certain of how she gained visual access into the police cruiser -- either by standing straight or leaning to look inside. She claimed to have seen Tim Branham's head in a compromising position, but she mistakenly identified his hair color as brown rather than gray. And so the record continues, revealing a string of circumstantial evidence highly contradictory when reviewed in its totality.

Appellee's brief notes or perhaps concedes that Martin might have been more appropriately charged with "Inefficiency" and Dishonesty." That may or may not be true. The fact remains that he was accused of sodomy and that the Kentucky State Police elected to proceed with an administrative inquiry prior to a trial of the criminal case. KSP cannot now argue that a different charge may have been more appropriate. There is no doubt that every state trooper has an obligation, indeed a sacred duty, to conduct himself professionally at all times and to remain constantly prepared to assist his fellow officers while on duty. This opinion in no way condones or vindicates dereliction of duty by a police officer. It is, rather, a reminder that -no matter how repugnant the conduct alleged -- the KSP administrative tribunal has an obligation to adhere to fundamental due process.

For the foregoing reasons,, we reverse the amended

order of Franklin Circuit Court.

MILLER, JUDGE, CONCURS.

GARDNER, JUDGE, DISSENTS AND FILES A SEPARATE OPINION. GARDNER, JUDGE, DISSENTING: I respectfully dissent. The charge of dishonesty is a Class A violation. The Trial Board found that Martin lied during the investigation about his underlying conduct, i.e., oral sexual gratification while on duty, in uniform, within the confines of a Kentucky State Police cruiser. It is of little solace to Martin that his conduct was licit or illicit. The majority, I believe, perceives some fundamental unfairness in the timing of the criminal investigation and overlapping internal administrative process.

The administrative charge of dishonesty is separate and distinct from the criminal charge. While it is certainly true that Martin could have cooperated truthfully and faced both criminal prosecution and termination of his employment, his untruthful answers, but for Hasson, supra, have led to the same result.

The Kentucky State Police per its policy and procedure manual has a duty to ensure that officers are ". . . at all times honest and truthful." Kentucky State Police

Policy & Procedure Manual. (emphasis added). Martin's participation in the investigation has impaired the basic functions entrusted by law to the Kentucky State Police.

The charge of dishonesty for lying about the commission of the underlying conduct is supported by substantial evidence, and I would affirm the Franklin Circuit Court's amended order.

BRIEFS FOR APPELLANT:
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BRIEF FOR APPELLEES:
Kathryn Walton
Frankfort, KY

RENDERED MARCH 19, 1998.
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
97-SC-116-DG
(95-CA-1628)

KENTUCKY STATE POLICE, ET AL. MOVANTS

APPEAL FROM THE FRANKLIN CIRCUIT COURT
V. HON. ROGER CRITTENDEN, JUDGE
NO. 91-CI-91

JEROME MARTIN RESPONDENT

MEMORANDUM OPINION OF THE COURT

REVERSING

This case involves a disciplinary proceeding against a Kentucky State Police officer. He was accused of engaging in a homosexual sex act, while he was in his cruiser and while he was on duty. This act occurred prior to this Court ruling that the sodomy statute was unconstitutional, in Commonwealth v. Wasson, Ky., 842 S.W.2d 487 (1993).

A disciplinary proceeding was initiated against the trooper on two separate grounds. The first was for nonconformance with the law, for violating the sodomy statute. The second was for dishonesty, for being untruthful with investigators and his superiors during the investigation of the allegations.

A Kentucky State Police Trial Board was convened to hear these charges, pursuant to KRS 16.140(8). After an evidentiary hearing was conducted, the Trial Board determined that the officer should be dismissed, on both charges. An appeal was taken to the Franklin Circuit Court, pursuant to KRS 16.150. That court affirmed the ruling, on both charges.

While an appeal was pending in the Court of Appeals, this Court rendered the opinion in Commonwealth v. Wasson, supra. As a result, the Court of Appeals remanded the case to the Franklin Circuit Court for further proceedings, in light of that opinion.

On remand, the Franklin Circuit judge held that the charge for non-conformance with the law could no longer stand. This was because the statute prohibiting the alleged activity had been found unconstitutional. However, the Franklin Circuit judge found that the charge of dishonesty was still viable, and that there was substantial evidence

within the record to support it. Thus, he again affirmed the Trial Board's dismissal of the officer.

The trooper appealed again. A split panel of the Court of Appeals reversed.

First, the majority stated that the Trial Board had acted in excess of its powers. The majority stated that the charge of dishonesty was so intertwined with the allegation of sodomy, that the two could not truly be separated. Since sodomy was no longer illegal, the majority reasoned that the Trial Board was attempting to use the charge of dishonesty to circuitously accomplish that which it could not do directly, i.e., discharge the trooper for an alleged violation of the law. Because the Board acted in excess of its powers, the ruling was to be overturned. KRS 16.150(4)(a).

In addition, the majority stated that the Trial Board's ruling was not supported by substantial evidence. The majority stated that the key eyewitness's testimony was replete with contradictions, inaccuracies and inconsistencies. This person "assumed" that the two men were involved in an act of sodomy. However, she testified that she never really saw the conduct directly.

One of the panel members dissented. He felt that

the charge of dishonesty (for lying about the commission of the underlying conduct) was supported by substantial evidence.

After a review of the record, we agree with the dissent.

The facts were developed before the Trial Board as follows.

On the Sunday of Memorial Day weekend in 1990, a 59 year-old man and his 61-year-old wife decided to visit the grave of the man's parents. The cemetery was in a very secluded area of Pike County. The road approaching the cemetery was one lane, up a steep hill and unpaved. There was a "switchback" in the road, so that cars could either turn around or allow other vehicles to pass. The switchback was approximately 40 feet down the hillside from a one-lane dirt road into the cemetery.

When the couple drove into the cemetery, they came up behind a parked State Police cruiser. The cruiser appeared to be unoccupied. The husband decided that he did not want to block the cruiser, in the event that the driver needed to leave while the couple were visiting the grave sites. Thus, he decided to park the car back down the hillside in the switchback. He let his wife out of the car, so that she would not have to walk back up the hill.

While the husband was parking the car, the wife walked up along the side of the cruiser. She stated that when she got even with the passenger door, she looked into the car. She stated that she saw two men in the front seat. One was a black man. He was in the driver's seat and in a state trooper's uniform. She stated that the trooper's trousers were down around his knees. She stated that she saw the other man, with his head face down on the trooper's lap. She immediately turned around and walked back towards where her husband had parked the car.

Her husband testified that as he was walking towards his wife, he saw two heads pop up in the front seat of the cruiser. The cruiser's engine was started and it was driven to the top of the hill.

The wife kept walking towards her husband and their car. The husband and wife got back into their car and drove into the cemetery. They placed flowers on the graves.

When the husband and wife left the cemetery, they went to turn around in an area which had recently been graded for the building of a house. The police cruiser was there. The husband and wife then recognized the man who was in the company of the state trooper.

The woman had a son who was a state trooper. Two days later, she told her son about the incident. He reported it to the commanding authorities at the Pikeville post. They initiated an investigation.

The facts reveal that the trooper was sent to this area, in order to investigate a burglary. The man in the car was the victim of the burglary.

Both the trooper and the burglary victim denied that a homosexual encounter had taken place.

The State Police officer who investigated the case stated that he discovered a number of inconsistencies which concerned him.

First, he noted that the trooper's description of his travels of the day did not match up with a State Police report of the trooper's movements. The report was prepared by post radio dispatchers, contemporaneous with communications with officers. Officers are to report their locations and their activities.

The dispatcher's report did not mesh with the trooper's description of his activities. The trooper's description placed him 45 minutes away from the burglary scene, when he received the call to investigate it. The

dispatcher's log did not verify that. According to the log, the trooper should have been much closer.

Further, the trooper stated that he was performing a "road check" at the time. It is something akin to a road block.

If true, this was a violation of State Police procedures. Officers are to obtain prior approval, before conducting road checks. Further, they are not supposed to conduct them without having other officers present.

Still further, the trooper failed to call in, once he arrived at the burglary scene. This was a violation of procedure. In fact, he called in over an hour later and asked the radio dispatcher to back up the time to when the trooper said he first arrived, not the time when he called in.

The next discrepancy (which concerned the investigating officer) was with how the trooper and the burglary victim actually came to be in each other's presence on that day. According to the trooper, he pulled up the hill, in order to find a secluded place to urinate. The investigating officer took note of the fact that the trooper had to drive past two places with public restrooms. In any event, the trooper stated that after he finished urinating and was walking back to his car, he saw the

victim walking up the hill towards him. According to the trooper, that was when he first met this man.

This was different from the story told by the victim. According to the investigator, the victim stated that he was out on the hillside looking for clues, when a State Police car came rolling past him. The officer stopped and spoke to him after rolling down the window, without leaving the car. According to the victim, the trooper was sent to the hillside by the victim's wife, after the trooper first stopped by the victim's home.

This story was not verified by the victim's wife. She stated that the first time she saw the trooper on that day was after the trooper and her husband had already looked over the hillside.

The investigating officer was also concerned with the fact that the trooper said he had just met the burglary victim on the day of the investigation. However, when the investigator first met with the burglary victim, the investigator stated that the victim said that he had known the trooper for some months and had met him on several occasions.

The investigator was also concerned that the trooper had failed to pass, when he took a polygraph test. The

investigator also pointed out that the burglary victim initially agreed to take a polygraph test. However, when he was contacted to make specific arrangements, the burglary victim declined to take the test.

Four months after these allegations were made, a State Police serologist conducted a chemical test on the seat of the police cruiser. It rendered a positive result for a substance found in semen. The positive test was on a small spot directly underneath the steering wheel.

All of this testimony was put before the State Police Trial Board.

Before the Trial Board, the defense went to great lengths to point out perceived inconsistencies in the eyewitness's testimony. She apparently had changed her estimate of the distances from the switchback to the cemetery road, from 20 feet to 40 feet to 50 feet. She also testified that the hair color of the man in the car with the trooper was brown. However, the burglary victim's hair was gray. Much time and effort was also spent on perceived inconsistencies between her initial statement, statements made during a polygraph examination and her testimony before the Trial Board.

It appears that at the polygraph, the eyewitness

stated that she never really saw the conduct directly, and that she only "assumed" that the two men were involved in an act of sodomy. The defense saw this as being equivocal.

At the hearing before the Trial Board, the investigating officer stated that he believed that the eyewitness was operating under some confusion, at the polygraph examination. He thought that she believed that she had to actually see the trooper's genitals in the other man's mouth, in order to state positively that she had seen an act of sodomy. She was nervous in the extreme, to the point of being hostile and uncooperative at the polygraph exam. However, she did not ever equivocate that she saw that the trooper's pants were down and that the other man's face was in the trooper's lap.

The defense also attempted to discount the eyewitness testimony, on the basis of racial animus. A loved one of hers (her second husband) had been shot and killed by a black man who was in the course of committing a crime. The defendant trooper was the only black officer assigned to the Pikeville post, at the time.

The tenor of the trooper's defense throughout this case was that the trooper was the victim of a witch hunt. It was argued that the charges were initiated by State Police

authorities, not the eyewitness. (Apparently she declined to sign the initiating complaint.) The defense maintained that the investigation was biased, to the point of misrepresenting the facts of the case. Further, it was argued that the result was tainted by the process, i.e., the State Police were complainant, investigator, prosecutor, judge and jury.

We are compelled to affirm the Trial Board's ruling.

The simple fact is that the Kentucky State Police Trial Board has been given the role of serving as the finder of fact in disciplinary hearings of this nature. KRS 16.140. The Trial Board is invested with the exclusive jurisdiction of discipline and removal of State Police officers. Hughes v. Welch, Ky.App., 664 S.W.2d 205 (1984). Trial Board tribunals are administrative hearings. The Board's actions are subject only to strict review on appeal, pursuant to KRS 16.150(4). Hughes, supra, p. 108.

There were conflicting facts put before the Trial Board. The Board had the lawful task of deciding which sets of witnesses to believe. It was within the scope of the Trial Board's authority to believe the testimony put forth by the eyewitness and her husband, when coupled with the results of the chemical test of the cruiser and the inconsistencies discovered by the investigator. The Board's

ruling was based on evidence placed before it. As a result, that ruling is not to be disturbed on appellate review.

There is no question that the record also contained sufficient evidence which would have supported the Trial Board's ruling the other way. It would only lengthen this opinion, to discuss those points of evidence in detail. It is sufficient to state that counsel for the trooper developed these arguments very thoroughly.

However, the Trial Board was persuaded by the opposing evidence. Just as the issue was honesty/dishonesty in Hughes v. Welch, supra, the Trial Board had sufficient evidence before it to rule as it did.

The Court of Appeals opinion is reversed. The ruling of the Franklin Circuit Court is reinstated, in which the Trial Board's order of dismissal was affirmed.

Stephens, C.J., Cooper, Graves, Johnstone, Lambert and Wintersheimer, JJ., concur.

Stumbo, J., not sitting.

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SUPREME COURT OF KENTUCKY
97-SC.-116-DG
(97-CA-1628)

KENTUCKY STATE POLICE, ET AL.
APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
V. HON. ROGER CRITTENDEN, JUDGE
NO. 91-CI-91

JEROME MARTIN
APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing of this Court's opinion rendered March 19, 1998, filed by appellee Jerome Martin, is hereby denied.

Stephens, C.J., Cooper, Graves, Johnstone, Lambert and Wintersheimer, JJ., concur. Stumbo, J., not sitting.

ENTERED: June 18, 1998.
Robert F. Stephens
Chief Justice